UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

STATEN ISLAND COMMUNITY TELEVISION

Employer

and Case No. 29-RC-9776

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Henry Powell, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. Staten Island Community Television, herein called the Employer or SICT, argues that the Board lacks jurisdiction over it because it falls within the "political subdivision" exception to the definition of "employer" set forth in Section 2(2) of the

Act. By contrast, the National Association of Broadcast Employees and Technicians, Communications Workers of America, AFL-CIO, herein called the Petitioner or the Union, contends that SICT is a private employer, subject to the Board's jurisdiction. The Petitioner called as its sole witness Eugene Garnes, its Secretary and Director of Organizing. The Employer's witness was Edward Salek, a businessman who serves in a voluntary capacity as the Employer's President of the Board of Directors.[1]

Facts

The parties stipulated that the Employer, a New York corporation with its principal office and place of business located at 100 Cable Way, Staten Island, New York, is in the business of providing the community with access to television equipment and studios, and related services. During the past year, which period is representative of its operations in general, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of $100,000, and purchased and received at its Staten Island facility, goods valued in excess of $5,000, directly from suppliers located within the State of New York, which suppliers, in turn, received said goods and supplies directly from outside the State of New York.

The Employer's Certificate of Incorporation[2] indicates that the Employer "is organized to operate exclusively for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code." Section 501(c)(3) provides,

[1] Salek testified that he has served on the Board for ten years, and as President of the Board since 1996, with a one-year gap necessitated by a provision in the Employer's by-laws limiting officers to three consecutive one-year terms.

[2] The certificate of incorporation is under the Employer's original corporate name, "Staten Island Access Corporation." It was executed on January 17, 1983, by the Employer's initial three directors, one of whom was Ralph Lamberti, Deputy Borough President of Staten Island. Otherwise, the document is silent with respect to any governmental purpose, function, role or connection. The photostatic copy of this document, received into evidence as Employer's Exhibit 1, appears to be missing a number of lines of text, which do not appear to be significant, between the bottom of page 1 and the top of page 2.

in relevant part, that "Corporations…organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes" are exempt from federal income taxes[3] if "no part of the net earnings…inures to the benefit of any private shareholder or individual," and provided that it does not "participate in…any political campaign" or "attempt…to influence legislation." The Certificate of Incorporation limits the Employer's activities in accordance with these requirements.

In addition, the Employer's Certificate of Incorporation sets forth the following corporate purposes: "(i) to sponsor, support, develop, finance, and participate in the development of, public services and programming for the residents of Staten Island, New York, to be distributed over, or in connection with, cable television systems franchised by New York City for Staten Island, New York; and (ii) to administer, manage, and control the Access Channels on said cable television systems; and (iii) to solicit and receive contributions…" Similarly, the Employer's Staff Operative Procedures and Policy handbook[4] states that the Employer "is the not-for-profit organization charged with administering public access on the Staten Island Cable system…Our mission is to facilitate public access training and programming for the residents of the franchise area (Staten Island)."

Likewise, Salek described the Employer as a not-for-profit public access center which provides "resources for the community to produce their own programming and put it on the air through the facilities of Time Warner Cable and Staten Island."

[3] In addition, Salek testified that he thinks that the Employer has a New York City tax exemption, but he had no specific knowledge or documentation regarding the nature of the exemption, or whether it has any bearing on the Employer's Section 2(2) status.

[4] With an effective date of May 25, 2001.

Programming is supplied by volunteer producers from the Staten Island community at large. In addition, Salek testified that the Employer operates under a franchise agreement between the Employer, the City of New York and Time Warner Cable. The franchise agreement was not produced at the hearing.

In its brief, the Petitioner stresses that, as a public access cable channel, the Employer is governed by the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. Sec. 521 et seq. The stated purposes of this statute include "to establish franchise[5] procedures and standards…which assure that cable systems are responsive to the needs and interests of the local community," and "to assure that cable systems will provide the widest possible diversity of information sources and services to the public." 47 U.S.C. Sections 521(2), 521(4). In furtherance of these goals, the Cable Act authorizes franchising authorities to require operators[6] to set aside cable channels for "public, educational, or governmental use." 47 U.S.C. Section 531(a).

These "public, educational, or governmental" channels "are known as PEG channels or PEG access." *Time Warner Cable of New York City, A Division of Time Warner Entertainment Company, L.P. v. City of New York*, 943 F.Supp.1357, 1367 (S.D.N.Y., 1996). Each of these three subcategories is different. Public access channels are available to individuals, community groups and members of the general public on a

[5] Since cable television lines have to be "laid in the ground and attached to poles," cable operators such as Time Warner typically negotiate "franchise agreements with local governments—'franchising authorities' in the telecommunications lexicon—to obtain the rights-of-way necessary to lay the cable wires." *Time Warner Cable of New York City, A Division of Time Warner Entertainment Company, L.P. v. City of New York*, 943 F.Supp. 1357, 1366 (S.D.N.Y., 1996).

[6] "Cable operators" transmit the signals and own the physical assets of cable companies, "cable programmers" produce programs and "franchising authorities" are local governments who negotiate franchise agreements giving rights-of-way to cable operators, subject to extensive municipal and local regulations set forth in these franchise agreements . *Id.*

"first-come, first-served non-discriminatory basis," allowing them to "communicate their message to the general public." *Time Warner,* 943 F.Supp. at 1369, 1371 (quoting S.Rep. No. 102-92, at 52-53 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1185-86; additional citations omitted). By contrast, governmental channels are "available for use by municipal and state government" and are used to "disseminate information about governmental activities and to cover local government proceedings." *Time Warner,* 943 F.Supp. at 1371. Educational channels are "available for use by local educational authorities and institutions," and allow "local schools to supplement classroom learning and to reach out to teach those who are beyond school age or unable to attend classes." *Time Warner,* 943 F.Supp. at 1369, 1371 (quoting S.Rep. No. 102-92, at 52-53 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1185-86; additional citations omitted). In the Borough of Manhattan, for example, "Of the nine PEG channels…four are designated for public access use and are administered by the Manhattan Neighborhood Network, a non-profit entity independent of the City…The remaining five channels represent the "EG" in PEG and are administered by a City agency." *Time Warner,* 943 F.Supp. at 1374.

Significantly, the statute also safeguards the editorial autonomy of operators, programmers, and PEG users. Programming decisions are protected under 47 U.S.C. Section 544(f)(1), which provides that "[a]ny federal agency, State, or franchising authority may *not* impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter" (emphasis added). A House Report promulgated in connection with the Cable Act characterized its access channel requirements as "narrowly drawn structural regulations that will ensure a diversity of information sources *without governmental intrusion* into the content of programming

carried on the cable system." *Time Warner,* 943 F.Supp. at 1370 (quoting H.R.Rep. No. 98-934 at 35 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 4672)(emphasis added). It is in the context of these statements that the alleged ability of the Staten Island Borough President to influence SICT's programming decisions[7] must be evaluated.

The Petitioner's witness, Eugene Garnes, provided one transcript page of direct testimony, for the limited purpose of authenticating a November 16, 2001, letter from the New York City Office of Collective Bargaining ("OCB"). The letter informed the Union that the OCB was administratively dismissing its petition[8] to represent SICT's employees, for the following reasons:

> Pursuant to the Rules and Regulations of the City of New York, Section 1-02(b), the Office of Collective Bargaining has jurisdiction over public employees, and more specifically employees employed by the City of New York, certain public benefit corporations, and authorities whose funds are derived from the City treasury. It appears that [SICT] is a not-for-profit private corporation established under New York State law and not a municipal agency, public authority or public benefit corporation. The employees are not paid in whole or in part from the City treasury, but rather all the corporation's revenues are derived from private sources. (Petitioner's Exhibit 1)

Salek confirmed that, as indicated in the OCB's dismissal letter, the Employer receives no public funds from New York State, New York City or Staten Island. Rather, SICT receives 98-99%[9] of its revenues from Time Warner Cable, herein called TWC, pursuant to the franchise agreement that is not in evidence. Time Warner Cable, the cable service provider for Staten Island, funds SICT by charging its Staten Island

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[7] *See infra* pp. 11-12.

[8] The Union filed its petition with the OCB after the September 6, 2001, withdrawal of its petition in Case No. 29-RC-9721. The latter petition, filed with this Region on August 23, 2001, was substantially identical to the petition in the instant case. There was no formal disposition of Case 29-RC-9721 prior to its withdrawal. The Employer filed position papers in both 29-RC-9721 and the subsequent OCB case, arguing that neither the Board nor the OCB has jurisdiction over SICT. This remains the Employer's position.

[9] The additional 1-2% of the Employer's revenues is derived from training classes offered by SICT.

subscribers an annual fee[10] of "about $7.10 per household." Salek "guessed" that there are "about 107,000" cable subscribers in Staten Island, constituting "about 85%" of Staten Island households. SICT programming is not transmitted to non-subscribers, who do not contribute to the Employer's revenues. There are no public fund-raising drives.

Salek conceded that the state and city of New York do not influence the Employer's day-to-day operations. He also acknowledged that SICT employees are paid directly by SICT, not by the Borough of Staten Island or by New York City or State. Their pay scale and benefits are different from those of municipal employees, and are not administered by the City of New York. In determining employees' salaries and benefits, the Employer does not consult with New York City agencies or do comparative surveys of New York City government salaries. Further, SICT employees do not receive training from any municipal agency, and discharged SICT employees do not have recourse to avenues of appeal provided to municipal workers through the civil service system. The City does not have any input into SICT's employee handbook/policy manual or regulate job postings by the Employer. In short, the Employer's human resources functions are handled internally.

However, the Employer's by-laws, which under their own terms can be altered, amended or repealed, give the Staten Island Borough President the authority to appoint the Employer's directors to staggered, three-year terms. In addition, if a director's seat becomes vacant in mid-term, the Borough President is empowered to appoint replacements. After the directors' three-year terms expire, the Borough President determines whether to reappoint the same individuals.

[10] Salek did not know whether this fee is billed on a one-time basis, or apportioned among customers' monthly cable bills.

By contrast, the by-laws provide that the Board of Directors has sole authority to remove a director for cause. Nonetheless, Salek claimed that the Board had never used this power, and that the Borough President's ability to request resignations has more practical significance. For example, Salek asserted that in 1999, all 21 directors complied with the Borough President's request that they resign. Of the 21, the Borough President accepted the resignations of 10 directors, replacing them with six new directors. He then asked the Board to change the maximum number of directors, set forth in the by-laws, from 21 to 17. According to Salek, the Board agreed, but has not embodied this change in writing.

Salek testified that the residents of Staten Island have no say in the composition of SICT's Board of Directors.

According to the Employer's by-laws, only the Board of Directors has the power to appoint and remove the Employer's officers.[11] With the exception of the Executive Director, the officers have one-year terms. They are compensated for their services only if they are full-time employees, whereas directors who are not officers are never compensated, except for incidental expenses.

The Employer's by-laws describe the role of the Executive Director as follows:

> The Executive Director shall be the chief operating officer of the Corporation. Subject to the control of the Board of Directors, the Executive Director shall (i) supervise and control all the affairs of the Corporation in accordance with any policies or directives approved by the Board of Directors; (ii) appoint an appropriate staff to administer the affairs of the Corporation; and (iii) have such other authority and perform such other duties as the Board of Directors may determine from time to time.

[11] This is consistent with Molinari's June 28, 2001 letter to Salek, which stated that Salek was being reappointed as a director, not as President.

Salek characterized the Executive Director, Assistant Executive Director and facility engineer, all of whom are appointed by the Board, as "the three people who pretty much run the day to day operations." The Executive Director "oversees the entire operation…hires staff, designates hours of employees, operating hours…runs the day to day business of Staten Island Community Television." He sets the hiring criteria for all employees other than the three aforementioned individuals. The three Board appointees, "hire the [additional] personnel as needed. They present it to the Board at the monthly meeting. The Board approves the Executive Director's report and in approving that Executive Director's report they also approve any hiring that are [sic] announced by the Executive Director at that time." Under cross-examination, Salek admitted that a hiring decision can become effective before the Board of Directors approves it. However, under redirect examination, he contended that the Executive Director would never hire someone without the approval of the Board of Directors. This contradiction is not resolved by any provision in the Employer's by-laws or other documentation.

In addition, Salek testified that the Executive Director determines the job duties and work schedules of SICT employees, makes recommendations to the Board of Directors regarding their salaries and benefits, and is empowered to terminate them. While asserting that there is a procedure (not mentioned in the by-laws or other documentation) for appealing a termination decision to the Board of Directors, Salek conceded that this had never occurred.

Salek testified that the Executive Director is responsible for drafting the employee handbook/policy manual, although "adjustments" are made after the Board of Directors reviews it. This handbook, entitled "Employer's Staff Operative Procedures and Policy,"

states that the Executive Director sets employees' schedules and writes their performance appraisals. He determines how much training will be given each employee. He is responsible for the Employer's software and any related training. He recommends salary raises, subject to the approval of the Board of Directors. In addition, it is to the Executive Director that employees submit requests for scheduling changes, vacation leave, personal days, leaves of absence, bereavement leave (with the number of days left to the discretion of the Executive Director), jury duty (with salary payments after three weeks left to the Executive Director's discretion) and leaves for the observance of religious or ethnic holidays. The Executive Director is the person employees must contact with regard to everything from questions about the pension plan to accidents, and from sexual harassment to calling in sick.

As to the Employer's Board members, Salek asserted that the Board of Directors sets policy, including personnel policy. Accordingly, the Board determines the salaries and benefits for all employees, relying on recommendations made by the Executive Director. There is no evidence that the Borough President plays any role in personnel matters.

The Board of Directors also "oversees the administration of the facility" and does the budget. For reasons not articulated at the hearing, the Board "discusses" the budget with the Borough President. However, the Borough President lacks any power to override the budget, and his budgetary role, if any, was not explained.

The Employer's by-laws provide for one annual meeting of the Board of Directors, and at least two regular meetings. It appears from the record that the meetings generally occur on a monthly basis. Minutes of the meetings are not made available to

the public, but Salek testified that the Borough President or his representatives "sometimes" attend Board meetings. The Borough President does not have a vote on the Board, and the record does not disclose whether the Borough President or his staff actively participate in the meetings. Paradoxically, the Employer's by-laws provide for attendance at meetings by the cable operator, Time Warner Cable, and not by the Borough President.

As President of the Board of Directors, Salek provides the Borough President with monthly reports (none of which are in evidence) on "budget items…progress items…programming issues…and just on day to day problems or day to day questions with regard to the operation." These reports are not required by the Employer's by-laws, and their purpose was not explained. Similarly, when asked, "Does the Board of Directors provide an annual auditing statement to either the city or the borough?" Salek replied, "Yes, we do," but did not explain the reason for this or supply any supporting documentation. The Employer's by-laws provide that yearly audits will be distributed to the Board of Directors, but do not mention distribution to "the city or the borough."

Salek also replied, "Yes, we do," when asked whether directors take an oath of office, but he provided no specifics in this regard. The oath of office is not mentioned in the Board's by-laws.

With regard to the content of the programming aired by SICT, Salek testified that "under public access law the producer decides on their own programming as long as it's within the guise of the law and the standards." The Employer's by-laws do not give New York City or the Staten Island Borough President the power to influence programming decisions. Salek acknowledged that SICT has no obligation to televise municipal

government meetings, but maintained that "we do televise some…usually…on a recommendation from the Borough President…" In addition, Salek asserted that the Borough President and his assistants have "frequently" approached SICT's Board of Directors with suggestions that particular "programs of public interest, community issues," be aired by the Employer. According to Salek, this has occurred "ten or twelve times" during the past 18 months, and the Borough President's suggestions have always been followed. Finally, the Borough President's office had raised "concerns surrounding offensive programming that does [not] meet with community standards," which Salek "ultimately ha[d] to bring to the Executive Director."

Discussion

Section 2(2) of the Act provides in pertinent part that, "The term 'employer'…*shall not include* the United States or any wholly owned Government corporation or any Federal Reserve Bank or *any State or political subdivision thereof* …." Although the term "political subdivision" is not defined in the Act, "the Act's legislative history…does reveal, however, that Congress enacted the Section 2(2) exemption to except from Board cognizance the labor relations of federal, state and municipal governments, since governmental employees did not usually enjoy the right to strike." *Natural Gas Utility District of Hawkins County*, *Tennessee,* 402 U.S. 600, 91 S.Ct. 1746 (1971). Further, "the 'political subdivision' exemption has its ultimate basis in the Tenth Amendment considerations of state sovereignty and the Eleventh Amendment grant of judicial immunity to the states." *Crestline Memorial Hospital Association*, *Inc*., 668 F.2d 243, 245 n. 1 (6th Cir. 1982). Therefore, "the exemption found in Section 2(2) of the Act is to be construed narrowly." *Princeton Memorial Hospital*, 939 F.2d 174, 177 (4th Cir.

1991)(citing *NLRB v. Parents and Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989). In general, "the NLRB's jurisdiction is to be interpreted broadly." *Id.*

Accordingly, the Board "has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Hawkins,* 402 U.S. at 604-605. With regard to the second prong of this test, "responsibility to public officials or the general electorate" this is to be distinguished from mere submission to governmental regulation. *See Kentucky River Community Care, Inc*., 193 F.3d 444, 451 (6th Cir. 1999), *aff'd*, 532 U.S. 706, 121 S.Ct. 1861 (2001). Some federal courts have declined to exempt employers whose administrators' "responsibility to public officials or to the general electorate" is derived not from any statute or local law, but from the employers' by-laws or constitutions. *See Jefferson County Community Center for Developmental Disabilities, Inc*., 732 F.2d 122, 125 n. 3 (10th Cir. 1984); *Crestline Memorial Hospital Association, Inc*., 668 F. 2d 243, 245 (6th Cir. 1982); *but see Princeton Memorial Hospital*, 939 F.2d 174 (4th Cir. 1991). In that case, where the distinction was not made, the dissent objected that, "A private entity should not be able to immunize itself from the labor laws by declaring that a public official or body may remove its directors, especially when the entity can unilaterally revoke its declaration in the unlikely event any such removals are threatened." *Princeton*, 939 F.2d at 179.

Moreover, "satisfaction of the second prong of the *Hawkins* test will not always be sufficient to establish that an entity is exempt from the Board's jurisdiction."

Oklahoma Zoological Trust, 325 NLRB 171, 172 n. 12 (1997)(Member Fox, joining majority opinion but citing dissenting opinion in *Woodbury County Community Action Agency*, 299 NLRB 554, 555-61 (1990), *overruled on other grounds, Enrichment Services Program, Inc*., 325 NLRB 818, 820 n. 13 (1998)). Hence, in the cases cited in SICT's brief, the Board and Supreme Court did not decline jurisdiction based on *Hawkins'* second prong alone, relying, instead, on additional evidence of employers' quasi-governmental attributes.[12] In *Hawkins* itself, for example, the Court began by concluding that the utility district's commissioners were "responsible to public officials or to the general electorate." *Hawkins,* 402 U.S. at 608. This conclusion was based on the fact that the commissioners were appointed by an elected public official, and could be removed for cause through proceedings "initiated by the governor, the state attorney general, the county prosecutor, or ten citizens" (in contrast with SICT's directors and officers). *Hawkins,* 402 U.S. at 607. Nonetheless, in finding the utility district to be a political subdivision within the meaning of Section 2(2) of the Act, the Supreme Court went on to consider additional factors, none of which are present in the instant case. *Hawkins,* 402 U.S. at 608-9. Of particular importance was the utility district's authority to exercise the power of eminent domain, even against other governmental entities. *Hawkins,* 402 U.S. at 608. In addition, the commissioners had the power to subpoena witnesses and to administer oaths. *Hawkins,* 402 U.S. at 608. The utility district was "further given an extremely broad grant of 'all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature.'" *Hawkins,* 402 U.S. at 608. Furthermore, the district's records were required to be open for public inspection, and its annual financial statement,

including its method of setting rates, was required to be published in a newspaper of general circulation. *Hawkins,* 402 U.S. at 607. All users objecting to the district's rate-setting method were entitled to a public hearing and written decision.[13] *Hawkins,* 402 U.S. at 608. As for the district's tax status, income from its bonds was "exempt from federal income tax, as income from an obligation of a 'political subdivision'" as defined by the Internal Revenue Code. *Hawkins,* 402 U.S. at 608-9. Finally, its property and revenue was exempt from all state, county and municipal taxes. *Hawkins,* 402 U.S. at 607. All of these factors weighed in favor of finding the district to be a political subdivision, exempt from the Board's jurisdiction. *Hawkins,* 402 U.S. at 609.

The Employer's reliance on *Oklahoma Zoological Trust*, 325 NLRB 171 (1997), is similarly misplaced. In contrast with SICT, the employer/trust was "created under Oklahoma statute to take over the operation of the city zoo from the city of Oklahoma City," *Zoological,* 325 NLRB at 172*,* and thus the trust's purposes and operations were quasi-governmental in nature. Its nine trustees included the city manager of Oklahoma City, the mayor, the councilperson of the city,[14] and an additional six trustees selected by the mayor and confirmed by the city council. *Zoological,* 325 NLRB at 171, 172. The trustees (again, in contrast with SICT's directors and officers). were subject to statutory district court removal actions, which could be brought by other trustees or by members of the public. *Zoological,* 325 NLRB at 171, 172. Notably, the Employer was "funded almost exclusively from public funds," and was "accountable to the city council for approval of expenditure of the Oklahoma City Zoo tax fund and to the general electorate

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See *infra* p. 14-18 and cases cited.[12]

[13] The public records and public hearing requirements could be viewed as evidencing the district's "responsibility to the general electorate," but this was not specifically articulated by the Supreme Court.

[14] The aforementioned three trustees served *ex officio*, i.e., by virtue of the public offices they held.

for increased funding" through ballot referendums. *Zoological,* 325 NLRB at 172. Its meetings and records were required to be made public, and it had the power of eminent domain. *Zoological,* 325 NLRB at 172. All of these factors distinguish it from the instant case.

Likewise, the employer in *Pennsylvania State Association of Boroughs*, 267 NLRB 71 (1983), also cited by SICT in its brief, fulfilled quasi-governmental purposes and functions. The employer/association served as a lobbyist for the boroughs[15] of Pennsylvania. *Association of Boroughs*, 267 NLRB at 71. It held conferences for borough officials, and sponsored and monitored state and federal legislation affecting the boroughs. *Id.* The association was created by state statute for the purpose of "advancing the various interests of said boroughs, promoting remedial legislation, and discussing any and all topics relating to the welfare and conduct of the same and for the purpose of providing for a uniform and economical method of administering the affairs of the respective boroughs." *Id*. The association's governmental purpose entered into the Board's decision to decline jurisdiction, as did the fact that the association's officers and board of directors (unlike those in those in the instant case) were all required to be borough officials selected by their county associations. *Association of Boroughs*, 267 NLRB at 71, 73. Furthermore, these officers and directors could be removed from their positions with the association only if they lost their elected or appointed positions with their boroughs. *Association of Boroughs*, 267 NLRB at 72. The board of directors (unlike the SICT Board) did not have removal power. *Id.* The association's tax status also entered into the Board's analysis, inasmuch as the Employer was exempt from paying state sales tax on the basis that it was a "political subdivision" of the State.

Association of Boroughs 267 NLRB at 72, 73. Finally, dues paid by the member-boroughs constituted 30% of the association's revenues.[16] *Association of Boroughs*, 267 NLRB at 71. Thus, *Pennsylvania State Association of Boroughs* is distinguishable from the instant case.

In *Northern Community Mental Health Center*, 241 NLRB 323 (1979), the Board found the Employer to be "an agency of the six counties its serve[d] and therefore a political subdivision of the states of Wisconsin and Michigan." *Northern,* 241 NLRB at 323. Although referred to by SICT as "a case with strikingly similar facts,"[17] *Northern Community Mental Health Center* differs from the instant case in several critical ways. First, the employer/mental health center performed a quasi-governmental function. In both Wisconsin and Michigan, county governments were "statutorily mandated to provide services for the mentally ill, developmentally disabled, alcoholic and other drug dependent individuals." *Northern,* 241 NLRB at 323. Accordingly, the employer/mental health center's articles of incorporation stated that, "The Center will maintain a working and responsive relationship to the statutory authorities who have the responsibility for all mental health and health related services in the six county area." *Northern*, 241 NLRB at 323. Secondly, both states required "that the county boards of each county create boards to fund these services," and thus the employer/mental health center apparently received public funding. *Northern*, 241 NLRB at 323, 323 n. 1.

Thirdly, as with *Oklahoma Zoological Trust* and *Pennsylvania State Association of Boroughs,* there were a substantial number of elected officials on the employer/mental health center's board of directors. Out of a total of fourteen board members, seven were

[15] Defined as "the equivalent of an incorporated town or city." 267 NLRB 71, 71 n. 2.
[16] Source(s) of the other 70% of the association's revenue are not disclosed by the decision.

actually county supervisors, and five were appointed by county supervisors.[18] Moreover, these twelve directors (two for each county) also constituted standing committees on their county boards, and gave regular reports to them about the Employer. *Northern*, 241 NLRB at 323. Lastly, there was "some evidence that the counties themselves directly created the Center, in order to take advantage of a Federal grant which required that a nonprofit corporation be formed. *Northern*, 241 NLRB at 323, but there was insufficient evidence to establish that the employer health center met the first prong of the *Hawkins* test.

In short, numerous factors distinguish the Employer from those described in the cited cases.[19] For example, the Employer's certificate of incorporation sets forth a detailed list of corporate purposes, enumerating the functions it will carry out as a public access cable channel. This document contains no indication of any intent to fulfill governmental functions or purposes, or to serve as an arm of the government. The absence of any governmental purpose can be explained by the distinction between public access channels and governmental channels. As previously noted,[20] whereas the programming on governmental channels is supplied by governmental entities, the programming on public access channels is supplied by members of the general public. Moreover, the Cable Act limits governmental interference with public access channels'

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[17] Brief of Employer, p. 6.

[18] Of the two additional directors, one was appointed by a county hospital, and one by the Employer's board.

[19] The continuing viability of *Fayette Electrical Cooperative, Inc*., 308 NLRB 1071 (1992)("*Fayette I*"), also relied on by the Employer, is open to question. *See Fayette Electrical Cooperative, Inc*., 316 NLRB 1118 (1995)("*Fayette II*")(Board asserted jurisdiction); *Concordia Electric Cooperative*, 315 NLRB 752, 755 (1994)(overruling certain aspects of *Fayette I).*

[20] See supra p. 4-5.

programming decisions, casting further doubt on whether public access channels can be viewed as quasi-governmental entities.

Further, there is no evidence that the federal government, the City or State of New York or the Borough of Staten Island view the Employer as a political subdivision. On the contrary, the letter from OCB reflects that the City of New York views the Employer as a private corporation, funded by private sources. With regard to the Employer's tax status, the Employer's federal tax exemption is based on its operation exclusively for charitable and educational purposes, not on its status as a political subdivision. Moreover, the Employer's 501(c)(3) status prohibits it from engaging in quasi-governmental activities such as attempting to influence legislation. Although the Employer's witness appeared to believe there to be a municipal tax exemption as well, the record does not disclose whether any such municipal exemption is based on the Employer's alleged political subdivision status.

In addition, the record evidence reflects that the Employer receives no public funding. Its employees are paid directly by SICT. All personnel and labor relations functions are handled internally, without any input from the city, state, or borough governments. Significantly, none of the Employer's officers or directors is an elected or appointed government official. Although the by-laws provide that the Staten Island Borough President appoints the Employer's directors, most of the Employer's day-to-day labor relations functions are handled by the Executive Director, Assistant Executive Director, and facility engineer, who are appointed by the Employer's Board of Directors rather than by the Borough President. There is no evidence that the Borough President ever involves himself in labor relations matters. In addition, despite testimony that the

Borough President, for undisclosed reasons, receives monthly reports and annual auditing statements, attends some monthly meetings and "discusses the budget" with directors, the Employer's witness conceded that the Borough President has no direct involvement in the Employer's daily operations or financial affairs.

Furthermore, in contrast with most of the cited cases, the Employer's by-laws give the Board of Directors the sole power to remove the Employer's officers and directors, and to appoint the Employer's officers. The Board of Directors' sole removal power diminishes the degree of "responsibility to public officials." Moreover, the directors can amend the Employer's by-laws at any time. Thus, the extent of their public accountability is within their own control, not that of public officials or the general electorate.

Finally, the Employer lacks the power of eminent domain, or the ability to subpoena witnesses or administer oaths. Its meetings and records are not required to be public. Based on all of the foregoing, I find that SICT is an employer as defined by Section 2(2) of the Act, and not a political subdivision. Consequently, the Board's assertion of jurisdiction over SICT is consistent with the Act.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner is seeking an election in a unit consisting of all full-time and regular part-time training coordinators, studio operations managers, portable

production coordinators, studio coordinators, post production coordinators, receptionists, office managers, IT specialists, web designers, production assistants, cable cast coordinators, cable cast assistants and special projects coordinators,[21] but excluding all other employees, guards and supervisors as defined in the Act. The Employer has raised no issues regarding the appropriateness of this unit.

In conclusion, I find the following bargaining unit to be appropriate for the purposes of collective bargaining:

> All full-time and regular part-time training coordinators, studio operations managers, portable production coordinators, studio coordinators, post production coordinators, receptionists, office managers, IT specialists, web designers, production assistants, cable cast coordinators, cable cast assistants and special projects coordinators, employed by the Employer at its 100 Cable Way, Staten Island, New York, facility, but excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to

[21] The unit description was amended at the hearing to include the special projects coordinators.

vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by the National Association of Broadcast Employees and Technicians, Communications Workers of America, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before January 3, 2002. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances.

Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by January 10, 2002.

Dated at Brooklyn, New York, December 27, 2001.

/s/ Alvin Blyer
Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

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